PP

v.

LEW KOY

HIGH COURT MALAYA, TAIPING
VT SINGHAM JC
[CRIMINAL APPEAL NO: 41-04-2001]
18 SEPTEMBER 2001

CRIMINAL PROCEDURE: *Prosecution - Public Prosecutor - Sanction of Public Prosecutor - Absence of sanction - Whether sanction required before proceedings commenced - Whether proceedings ultra vires - Food Act 1983 - Federal Constitution, art. 145(3)*

CRIMINAL LAW: *Food Act 1983 - Section 19(2) - Whether proceedings instituted within statutory time limit - Whether proceedings instituted when complaint filed and registered in court or when respondent charged in court*

CRIMINAL PROCEDURE: *Acquittal or discharge - Acquittal of accused without hearing prosecution's case - Whether magistrate empowered to do so - Criminal Procedure Code, s. 173(c) and (f)*

The accused/respondent, who was charged with an offence under the Food Act 1983 at the Magistrate's Court, was acquitted and discharged by the learned magistrate as a result of two preliminary objections raised by the defence which were: (i) that the prosecution did not tender a sanction from the public prosecutor when the proceedings were commenced as required under art. 145(3) of the Federal Constitution and therefore the proceedings were *ultra vires*; and (ii) that the proceedings were commenced after the expiration of 90 days from the time the food was purchased in contravention of s. 19(2) of the Food Act 1983. The learned deputy public prosecutor appealed against this decision.

Held:

[1] There is no express provision contained in the Food Act 1983 that requires a sanction before the commencement of criminal proceedings in the Magistrate's Court. Therefore, the proceedings were not *ultra vires* and the learned magistrate had erred in law when she upheld the first preliminary objection. (p 99 a-b)

[2] There was compliance of the 90 days statutory period under s. 19(2) of the Food Act 1983 when the complaint was filed and registered in court on 26 April 2000 as this was the relevant date to determine when the proceedings were instituted, and not when the respondent was charged in court on 26 June 2000. (p 100 f)

[3] The learned magistrate had the jurisdiction to hear the case and she should have overruled both the preliminary objections and proceeded with the case, as s. 173(c) and (f) of the Criminal Procedure Code does not empower her to order an acquittal without hearing the evidence of the prosecution. (p 103 e-f)

[Appeal allowed.]

Case(s) referred to:
Abdul Hamid v. PP [1956] MLJ 231 ***(foll)***
Ak Koh Enterprise Sdn Bhd v. PP [2000] 6 MLJ 184 ***(not foll)***
Carlsberg Brewery Malaysia Bhd v. PP [1993] 1 MLJ 273 ***(refd)***
Chu Chee peng v. PP [1973] 2 MLJ 35 ***(foll)***
Dato' Seri Samy Vellu v. S Nadarajah [2000] 8 CLJ 117 ***(refd)***
Hassan Isahak v. PP [1948-49] MLJ Supp 179 ***(refd)***
Hj Mohamed Paiman v. PP [1966] 1 MLJ 58 ***(foll)***
Joginder Singh v. PP [1984] 2 MLJ 133 ***(refd)***
Kyohei Hosoi v. PP [1998] 1 CLJ 1063 ***(refd)***
Lyn Hong Yap v. PP [1956] 22 MLJ 226 ***(refd)***
Madjai Sanusi v. Pengarah Imigresen Negeri Johor & Ors [1999] 7 CLJ 569 ***(refd)***
Ng Chuan & Anor v. Rex [1948] 14 MLJ 185 ***(foll)***
Nguang Chan Sdn Bhd v. PP [2001] 2 CLJ 16 ***(refd)***
Perumal v. PP [1970] 2 MLJ 265 ***(refd)***
PP v. Bata (M) Bhd [2000] 3 CLJ 433 ***(refd)***
PP v. Jamil Jilap & Ors [2000] 5 CLJ 368 ***(refd)***
PP v. Lee Chwee Kok [1979] 1 MLJ 45 ***(refd)***
PP v. Lee Ming & Anor [1999] 1 CLJ 379 ***(refd)***
PP v. Lim Shui Wang & Ors [1979] 1 MLJ 65 ***(refd)***
PP v. Mahmud [1974] 1 MLJ 85 ***(foll)***
PP v. Mat Zain [1948-49] MLJ Supp 142 ***(foll)***
PP v. Mohamed Halipah [1981] CLJ 92; [1981] CLJ (Rep) 238 ***(refd)***
PP v. Oladotutun Lukmaru Umaru & Ors [1990] 2 CLJ 106; [1990] 2 CLJ (Rep) 795 ***(refd)***
PP v. Ooi Lye Seng [1991] 2 MLJ 332 ***(foll)***
PP v. Pengurus MBf Building Services Sdn Bhd [1998] 1 CLJ 678 ***(foll)***
PP v. Soon Tiew Choon [1976] 1 MLJ 189 ***(foll)***
PP v. Z [1995] 4 CLJ 383 ***(foll)***
PP v. Zainuddin & Anor [1986] 2 MLJ 100 ***(foll)***
Rajendran M Gurusamy v. PP [2001] 1 CLJ 631 ***(not foll)***
Re Abu Kassim [1964] 30 MLJ 12 ***(foll)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 ***(foll)***
Tang Shew Kai v. Reg [1956] 22 MLJ 229 ***(foll)***
Yek Tieng Sing & Ors v. PP [1971] 2 MLJ 94 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Criminal Procedure Code, ss. 129(1), 173(c), (f), 177A(1), 376(iii), 377(b), 380(ii)(b), 422
Employees Provident Fund Act 1951, ss. 16A(1)(c), 18(1)(a)
Federal Constitution, art. 145(3)
Food Act 1983, ss. 5, 19(2)
Immigration Act 1959/63, s. 58(2)
Immigration Ordinance 1959, s. 61C
Sale of Food and Drugs Ordinance, s. 20(4)
Securities Commission Act 1983, s. 392(2)
Securities Industries Act 1983, ss. 86, 126(2)
Trade Descriptions Act 1972, s. 28(B)(3)

Other source(s) referred to:
Stroud, *Judicial Dictionary of Words And Phrases*, 6th edn, vol 1

For the appellant - Abdul Hakim Amir Ahmad Nordin DPP
For the respondent - Fong Poh Kuan; M/s Ngeh & Co

Reported by

JUDGMENT

VT Singham JC:
This is an appeal by the learned deputy public prosecutor against the order of acquittal and discharge of the respondent by the learned magistrate of the Magistrate's Court, Kuala Kangsar on 10 January 2001 as a result of two preliminary objections raised by the defence counsel namely:

(1) the prosecution did not tender a sanction from the public prosecutor when the proceedings were commenced as required under art. 145(3) of the Federal Constitution and therefore the proceedings were *ultra vires*;

(2) the proceedings were commenced after the expiration of 90 days from the time the food was purchased in contravention of s. 19(2) of the Food Act 1983 (Act 281).

The respondent, aged 46 years was charged at the Magistrate's Court, Kuala Kangsar on 26 June 2000 as follows:

Charge:

> Bahawa kamu selaku penjual bahan makanan iaitu Hati Khinzir bertempat di premis No: 322, Jerlun NV, 33000 Kuala Kangsar, Perak, pada lebih kurang jam 9.30 pagi, ada menjual kepada Kamaruzzaman Bin Ab. Aziz, Kad Pengenalan No: 560307-08-5949 seorang Pegawai Berkuasa dibawah Akta Makanan 1983 dari Pejabat Kesihatan, Kuala

Kangsar, bahan makanan iaitu Hati Khinzir. Setelah dianalisa didapati bahan makanan tersebut mengandungi Beta Agonist (Salbutamol) iaitu sejenis residu drug yang dilarang digunakan didalam makanan mengikut Peraturan 40(5) dan dibaca bersama Jadual 15(A) daftar II kepada Peraturan-Peraturan Makanan 1985.

Oleh itu kamu telah melakukan satu kesalahan di bawah Seksyen 13(1)(e) dan dibaca dengan Seksyen 13(3)(d) kepada Akta Makanan 1983 iaitu menjual bahan makanan yang diadukkan dan boleh dihukum dibawah Seksyen 13(1) kepada Akta yang sama.

On hearing the preliminary objections by Ms. Fong Poh Kuan, the respondent's counsel and the reply by Mr. Dass Kandunni, the prosecuting officer on the first issue, the learned magistrate *inter alia* held that the sanction was required for the prosecuting officer to commence the proceedings for the offence under the Food Act 1983 and that it must be tendered to the court as an exhibit before the trial began so as to confer jurisdiction on the court. She held that in this case there was no sanction tendered in court as an exhibit by the prosecuting officer and therefore the court had no jurisdiction to hear the case. She upheld the preliminary objection and acquitted and discharged the respondent. Article 145(3) of the Federal Constitution states "The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial."

On the second issue, the learned magistrate held that the proceedings against the respondent was instituted after the expiration of 90 days from the time the food was purchased on 31 January 2000 and the 90 days expired on 30 April 2000 and the respondent was charged in court only on 26 June 2000. She upheld the preliminary objection. Accordingly, the learned magistrate acquitted and discharged the respondent of the charge on both the grounds as raised by the defence counsel. In allowing the preliminary objection on the issue of sanction, the learned magistrate relied on *Ak Koh Enterprise Sdn Bhd v. PP* [2000] 6 MLJ 184 and *Dato' Seri Samy Vellu v. S Nadarajah* [2000] 8 CLJ 117. On the requirement of instituting proceedings before the expiration of 90 days from the time the food was purchased, she relied on *Carlsberg Brewery Malaysia Bhd v. Pendakwa Raya* [1993] 1 MLJ 273 and *Perumal v. PP* [1970] 2 MLJ 265. Section 19(2) of the Food Act 1983 states "where any food has been purchased or procured from any person for analysis or examination, no proceeding as in respect of the sale thereof or of any offence against this Act shall be instituted after the expiration of ninety days from the time of purchasing or procuring that food." The prosecution was dissatisfied with the decision and filed a notice of appeal on 16 January 2001 to appeal to the High Court. Hence, this appeal.

On appeal, the learned deputy public prosecutor submitted as follows:

(1) On the issue of sanction, he submitted that the learned magistrate had erred in law when she held that the sanction was required and it should be tendered to the court as an exhibit before the commencement of the proceedings. He submitted that no sanction was required under the Food Act 1983 and the magistrate was wrong in law when she upheld the preliminary objection raised by the respondent's counsel;

(2) on the issue that the respondent was first charged in court after the expiration of 90 days from the time of purchasing the food, he submitted that the proceedings were in fact instituted when the complaint was filed in court on 26 April 2000 by the Ministry of Health and registered in court which was before the expiration of 90 days requirement. He further submitted that the date for the purposes of s. 19(2) of the Food Act 1983 was the date when the complaint was filed in court on 26 April 2000 and not the date when the respondent was charged in court on 26 June 2000. Therefore, he submitted that the learned magistrate was wrong in law when she upheld the preliminary objection as raised by the respondent's counsel;

(3) he further submitted that the learned magistrate was wrong in law when she acquitted and discharged the respondent as she had not heard the evidence and that she could only discharge the respondent when she upheld the preliminary objections;

(4) that the appeal should be allowed and a retrial be ordered.

The learned deputy public prosecutor contended that the learned magistrate was wrong when she held that under art. 145(3) of the Federal Constitution the prosecution must obtain the sanction to commence the proceedings and he urged this court to disregard the decision in *Ak Koh Enterprise Sdn Bhd v. PP* [2000] 6 MLJ 184 as it was confusing and not clear as to whether His Lordship in that case was referring to a sanction or a letter of authority from the public prosecutor for the prosecuting officer to appear in court and conduct prosecution on behalf of the prosecution and whether His Lordship was also referring to the constitutional powers of the public prosecutor under art. 145(3) of the Federal Constitution. In *Ak Koh Enterprise Sdn Bhd v. PP* [2000] 6 MLJ 184, His Lordship Muhammad Kamil J said that since the respondent was charged for a seizable offence, a sanction or authorisation to prosecute an offence under the Food Act 1983 was mandatory. In that case, His Lordship Muhammad Kamil J held that:

> It is clear that under art. 145(3) of the Federal Constitution the public prosecutor (ie the Federal Attorney General) is vested with the power to institute, conduct or discontinue any criminal proceedings. There is a number of authorities on this point: *Repco Holdings Bhd v. PP* [1997] 3 MLJ 681 (CA); *PP v. Lee Ming & Anor* [1998] 4 MLJ 113; and *PP v. Famil Filap & Ors* [2000] 5 MLJ 311.
>
> A prosecuting officer may, under a particular law, institute a criminal proceeding but he must be authorized by the public prosecutor. Such an **authorisation** or **sanction** to prosecute is required for each offence, and it must be tendered into the court before the trial begins. Without an authorisation from the public prosecutor, it *ultra vires* the law and the proceeding would be a nullity. (emphasis added)

On the other hand, the learned counsel for the respondent, Ms. Fong Poh Kuan submitted as follows:

(1) no proceedings could be instituted against a defendant without a prior sanction of the public prosecutor as provided under art. 145(3) of the Federal Constitution. She contended that without the sanction from the public prosecutor, the magistrate had no jurisdiction to hear the case. She relied on *Ak Koh Enterprise Sdn Bhd v. PP* [2000] 6 MLJ 184 which was a decision of the High Court, Kuching;

(2) the proceedings against the respondent was not instituted before the expiration of 90 days from the date of purchasing the food. In the instant appeal, she contended that the food was purchased on 31 January 2000 whereas the respondent was charged in court only on 26.4.2000 which was very much after the expiration of 90 days as required under s. 19(2) of the Food Act 1983. The learned counsel for the respondent relied on *Perumal v. PP* [1970] 2 MLJ 265 and *Carlsberg Brewery Malaysia Bhd v. Pendakwa Raya* [1993] 1 MLJ 273 and submitted that the learned magistrate was correct when she found that the proceedings in the instant appeal were instituted after the expiration of 90 days.

This court is of the respectful view that there was certainly some confusion *Ak Koh Enterprise Sdn Bhd v. PP* [2000] 6 MLJ 184 as no distinction was drawn between a sanction as required under s. 129(1) of the Criminal Procedure Code, an authorisation letter pursuant to s. 377(b) of the Criminal Procedure Code which is given to a prosecuting officer to conduct prosecution in the lower courts and the constitutional powers of the public prosecutor as provided under art. 145(3) of the Federal Constitution. In fact, in *Ak Koh Enterprise Sdn Bhd*'s case, the only issue before the court was on the authorisation letter pursuant to s. 377(b) of the Criminal Procedure Code but with respect, it was mixed up and confused with a sanction. In *Ak Koh*

Enterprise Sdn Bhd, there was an appeal by the accused against the decision by the learned magistrate who had allowed the prosecuting officer of the medical department "to institute the criminal proceedings" against the accused without the authorisation letter of the public prosecutor to confirm his *locus standi* in court. Nevertheless, with respect, it is not clear as to whether His Lordship was referring to a sanction and an authorisation letter as the one and same issue in that case. On one hand, His Lordship said that the appeal was against the decision of the learned magistrate who allowed the prosecuting officer "to institute criminal proceedings" against the appellant without the authorisation letter of the public prosecutor and by this it would appear that His Lordship was referring to the *locus standi* of the prosecuting officer to conduct the prosecution as the only issue in that appeal. On the other hand, His Lordship in arriving at a decision had also considered the following cases, namely, *Hassan bin Isahak v. Public Prosecutor* [1948-49] MLJ Supp 179, *Ng Chuan & Anor v. Rex* [1948] 14 MLJ 185 and *Lyn Hong Yap v. Public Prosecutor* [1956] 22 MLJ 226 which cases are all in reference to a sanction and which are entirely two separate matters and the issue of sanction has no relevance to the issue of the authorisation letter which in fact is in reference to the *locus standi* of the prosecuting officer who conducted the prosecution.

However, in arriving at a decision, the following cases were also considered in that case, namely, *Repco Holdings Bhd v. Public Prosecutor* [1997] 4 CLJ 740, *Public Prosecutor v. Lee Ming & Anor* [1999] 1 CLJ 379 and *Public Prosecutor v. Jamil bin Jilap & Ors* [2000] 5 CLJ 368 which cases are all in reference to the *locus standi* of the prosecuting officer to conduct prosecutions and not as to the jurisdiction of the learned magistrate pursuant to s. 129(1) of the Criminal Procedure Code to proceed with the trial which are entirely two separate matters. Further still, reference was made to an authorisation letter in that case when it is stated in the grounds of judgment that the learned magistrate "seemed confused" when His Lordship said:

> The prosecution averred that an **authorisation letter** dated 11 April 1998 was issued to the prosecuting officer prior to the proceedings. That is to say, the authorisation had been issued prior to the trial which began on 10 November 1998. According to the notes of proceedings for 10 November 1998 1 March 1999, 14 June 1999 and 9 September 1999 (pp. 1-5 appeal record) the learned magistrate had not made any record of this **authorisation letter** dated 11 April 1998. However, he mentioned of two authorisation *viz*, one written on 1 April, 1998 (at p. 7 appeal record) and the other impliedly, on 1 August 1998 (at p. 8 appeal record) which gave the prosecuting officer the *locus standi.* He seemed confused. Much confusion in the magistrate's mind could have been avoided if the said **authorisation letter** dated 11 April 1998 was shown to him or tendered into court on 10 November 1998 when the trial began. In the Notes of Proceedings there is nothing on record to show that the said **authorisation letter** was tendered in court when the trial began. (emphasis added)

In his conclusion, the learned judge said that:

> In my judgement it is clear that no **authorisation letter** was produced or tendered in court when the trial began. There is no room for presumption when it comes to the interpretation of a statute. The practice adopted by the learned magistrate was *ultra vires* the law. Without this authorisation, **the court lacks jurisdiction to hear the case.** This defect cannot be cured. (emphasis added)

This court with respect is unable to follow the reasoning in *Ak Koh Enterprise Sdn Bhd* as stated above as there was no distinction drawn between (a) the constitutional powers of the public prosecutor as provided under art. 145(3) of the Federal Constitution, (b) the requirement for a sanction under s. 129(1) of the Criminal Procedure Code, (c) an authorisation letter under s. 377(b) of the Criminal Procedure Code and (d) the consent of the public prosecutor which are entirely separate matters and have separate functions. Article 145(3) of the Federal Constitution deals with the constitutional powers given to the Attorney General who is the public prosecutor to institute, conduct or discontinue any criminal proceedings for an offence except proceedings before a Syariah Court, a Native Court or a Court Martial. A sanction is given by the public prosecutor to institute prosecution for certain offences or prescribed offences and if this sanction is required under a particular Act before a prosecution could commence it will be expressly stipulated in the particular Act of the offence charged, for instance, offences under the Immigration Act 1959/63 (Act 150) (Sec 58(2)) which contains an express provision that "no prosecution shall be instituted in respect of any offence against this Act without the sanction in writing of the Director General or of the Public Prosecutor or his Deputy." Consequently, without the sanction being produced and filed in court, the Magistrate's Court cannot take cognisance of the offence under the Immigration Act 1959/63 and does not have the jurisdiction to hear the case (See s. 129(1) of the Criminal Procedure Code). Where a sanction is required to prosecute, the lack of it deprives the court of jurisdiction (see *Ng Chuan & Anor v. Rex* [1948] 14 MLJ 185, *Re Abu Kassim* [1964] 30 MLJ 12 and *Haji Mohamed Paiman v. Public Prosecutor* [1966] 1 MLJ 58. However, the Food Act 1983 does not contain such express provision for the requirement of a sanction before the criminal proceedings is commenced in the magistrate's court.

On the other hand, an authorisation letter refers to conduct of prosecutions in the Magistrate's Court where an officer of any Government Department, an officer of any local authority, an officer of statutory authority or body or any person employed or retained in any local authority or any statutory authority or body are authorised in writing by the public prosecutor to conduct prosecutions in the Magistrate's Court (see s. 377(b) of the Criminal Procedure Code which came into effect on 1 April 1998 (Amendment) Act 1998). In the instant appeal, an officer from the Ministry of Health appeared at the

Magistrate's Court and his appearance in court to conduct the prosecution was not challenged except for the preliminary objection that there was no sanction from the public prosecutor to institute the proceeding in court.

In *Abdul Hamid v. Public Prosecutor* [1956] MLJ 231, His Lordship Smith J drew a distinction between a sanction and a consent and the rights and powers contained in s. 376(iii) of the Criminal Procedure Code which has since been amended. His Lordship Smith J said:

> There is an essential difference to my mind between a **sanction** and a **consent**. A prosecution can be sanctioned without any deep consideration of the particular case: full consideration is required for consent since **'Consent'** is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side (*Stroud* 3rd Edition vol. I page 582). The **sanction** was therefore no evidence of consent. However I satisfied myself from evidence given by the learned Deputy Public Prosecutor that he had in fact fully applied his mind to the particular case and had consented before signing Ex. Pr (*R. v. Metz*, followed). (emphasis added)

In the circumstances, this court is of the view that the real issue in *Ak Koh Enterprise Sdn Bhd* which both the learned defence counsel and the learned magistrate in the instant appeal had relied on was actually in reference to the authorisation letter pursuant to s. 377(b) of the Criminal Procedure Code and as to the *locus standi* of the prosecuting officer and not in respect of a sanction pursuant to s. 129(1) of the Criminal Procedure Code to commence proceedings in court. Accordingly, this court is of the view that the learned magistrate in the instant appeal was certainly misled, firstly, in raising the preliminary objection that there was a requirement for a sanction when in fact there was no such requirement under the Food Act 1983 and secondly, in failing to distinguish the facts in *Ak Koh Enterprise Sdn Bhd*. On this ground alone, the appeal by the learned public prosecutor ought to be allowed.

In order to have a clear understanding of the constitutional powers of the public prosecutor under art. 145(3) of the Federal Constitution, a sanction, a consent, an authorisation letter, it is relevant to distinguish once again and reproduce the following for the sake of convenience:

Article 145(3) of the Federal Constitution is the constitutional powers given to the Attorney General which states:

> **Article 145(3) ATTORNEY GENERAL**
>
> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

Accordingly, by art. 145(3) of the Federal Constitution, the Attorney General who is the public prosecutor is clothed with the power to conduct proceedings in court, in all Magistrates Courts, Sessions Courts, the High Courts and the Superior Courts (see s. 3 of the Courts of Judicature Act 1964 for the meaning of "court"). (See *Rajendran a/l M Gurusamy v. Public Prosecutor* [2001] 1 CLJ 631). The appeal by the public prosecutor against the decision of Abdul Wahab J has been allowed by the Court of Appeal on 9 October 2000 *vide* Mahkamah Rayuan, Rayuan Jenayah No. W 05-54-00 and the case was remitted back to the Magistrate Court for prosecution.

In *Repco Holdings Berhad v. Pendakwa Raya* [1997] 4 CLJ 740, His Lordship Gopal Sri Ram JCA interpreted art. 145(3) of the Federal Constitution that the Attorney General is the sole authority to institute, conduct and discontinue criminal proceedings. In that case, the Securities Commission instituted proceedings against the accused for an offence in contravention of s. 86 of the Securities Industries Act 1983. Two Officers of the Securities Commission appeared in court to prosecute the case. Counsel who represented the accused took preliminary objection to the *locus standi* of the two officers who represented the Securities Commission to prosecute the case pursuant to s. 126 of the Securities Industries Act 1983 and s. 392(2) of the Securities Commission Act 1983 which gives the Chairman of the Commission the power to authorise in writing to any officer of the Commission to conduct the prosecution of any offence under the said Act. In declaring s. 126(2) of the Securities Industries Act 1983 and s. 392(2) of the Securities Commission Act 1993 to be unconstitutional, null and void and of no effect, His Lordship Gopal Sri Ram JCA held that the only authority that is constitutionally entitled to conduct prosecutions is the Attorney General who is the public prosecutor and that the Chairman of the Securities Commission is not authorised lawfully ie, to say constitutionally, to authorise or conduct prosecutions under the Securities Industries Act. However, His Lordship made it clear that if the Registrar of Companies who is usually a senior member of the judicial and legal service is a gazetted deputy public prosecutor and if he conducts the prosecution in such capacity of an offence under the Securities Industries Act, the prosecution of the offence would not be caught by art. 145 of the Federal Constitution.

A sanction in practice is usually given by a deputy public prosecutor without any deep consideration of the particular facts in detail and this is given pursuant to s. 129(1) of the Criminal Procedure Code and for offences expressly required under the particular Act or for prescribed offences. (See *Kyohei Hosoi v. PP* [1998] 1 CLJ 1063 at 1070).

In *Haji Mohamed Paiman v. Public Prosecutor* [1966] 1 MLJ 58, the accused was charged for an offence made under s. 61C of the Immigration Ordinance 1959 (now Immigration Act 1959/63) an offence of knowingly harbouring an illegal immigrant. The accused was convicted by the learned magistrate. On appeal to the High Court, the conviction was quashed as there was no written sanction produced when the accused was charged in court and accordingly, the proceedings were held to be a nullity.

A consent in practice is given in writing by the public prosecutor after full consideration of the entire facts in detail of a particular case or the investigation papers prepared by the relevant investigating agency to institute prosecution. (See s. 177A(1) of the Criminal Procedure Code *PP v. Oladotutun Lukmaru Umaru & Ors* [1990] 2 CLJ 1026; [1990] 2 CLJ (Rep) 795, *PP v. Lee Chwee Kok* [1979] 1 MLJ 45).

In *Yek Tieng Sing & Ors v. Public Prosecutor* [1971] 2 MLJ 94, the Federal Court said that once the public prosecutor or the deputy public prosecutor has given a consent or certificate, he must be presumed to have gone through into the facts of the case (See, *PP v. Mohamed Halipah* [1981] CLJ 92; [1981] CLJ (Rep) 238.)

An authority letter is an authorisation given to a person who is not a public prosecutor, a senior deputy public prosecutor, a deputy public prosecutor or an assistant public prosecutor to conduct criminal prosecution on behalf of the public prosecutor and this is spelt out in s. 377(b) of the Criminal Procedure Code.

On the issue of the written authority from the public prosecutor pursuant to s. 377(b) of the Criminal Procedure Code, this court is of the view that the written authority need not be tendered or filed in court but is only required to show to the court if ever there is any challenge that the prosecuting officer who is having conduct of the prosecution did not have the authority in writing of the public prosecutor to appear in court and conduct the proceedings. In such a situation, the prosecuting officer is only required to show to the court that he has been issued with the written authority by the public prosecutor or the deputy public prosecutor and it need not be tendered as an exhibit or filed in court as it is not a document shown to a witness and referred to by him in his evidence or by an affidavit (see *Stroud's Judicial Dictionary of Words And Phrases*, 6th edn, vol 1 for definition of exhibit). (See *PP v. Pengurus MBf Building Services Sdn. Bhd.* [1998] 1 CLJ 678 at 683).

In *Nguang Chan Sdn Bhd v. Pendakwa Raya*, the appellant a private limited company was charged for two offences under the Trade Descriptions Act 1972. An assistant Controller of Trade Descriptions appeared in court to conduct the prosecution of the case. Section 28B(3) of the Trade Descriptions Act 1972 stated that "any prosecution in respect of an offence under this Act may be conducted by an assistant controller." However, the learned magistrate before the conclusion of the trial transmitted the record of proceedings to the High Court and posed the following questions, namely:

1. Whether s. 28B(3) of Act 87 which allows proceedings to be conducted by an Assistant Controller of Trade Descriptions is *ultra vires* art. 145(3) of the Federal Constitution;

2. Whether the institution by the Assistant Controller of Trade Descriptions of proceedings under the said Act contravenes art. 145(3) of the Federal Constitution.

His Lordship KC Vohrah J (as he then was), presently judge of the Court of Appeal in *Nguang Chan Sdn Bhd v. Pendakwa Raya* [2001] 2 CLJ 16 relied on the decision in *Repco Holdings Berhad v. Pendakwa Raya* [1997] 4 CLJ 740 and *inter alia* held that s. 28(B)(3) of the Trade Descriptions Act 1972 (Act 87) which allows proceedings to be conducted by the Assistant Controller of Trade Description contravenes art. 145(3) of the Federal Constitution and that the proceeding conducted in the Magistrate's Court was a nullity.

On appeal to the Court of Appeal by the Attorney General against the decision of the learned judge of the High Court, His Lordship Lamin Mohd Yunus PCA in dismissing the public prosecutor's appeal *inter alia* in *Nguang Chan Sdn Bhd v. Pendakwa Raya* [2001] 2 CLJ 16 held that s. 28B(3) of the Trade Descriptions Act 1972 is *ultra vires* of art. 145(3) of the Federal Constitution and that the prosecution conducted in the Magistrate's Court was null and void.

However, it is important to note that the decision in *PP v. Bata (M) Bhd* [2000] 3 CLJ 433 was brought to the attention of the Court of Appeal in *Nguang Chan Sdn Bhd v. Pendakwa Raya* but the Court of Appeal did not disturb the views expressed by His Lordship Low Hop Bing J in that case. In *PP v. Bata (M) Bhd*, a similar issue was raised that the prosecuting officer, Mr. Bernard Gomez had no power to conduct the prosecution and the learned counsel relied on art. 145(3) of the Federal Constitution which states that only the public prosecutor has the power to institute, conduct or discontinue prosecutions. In that case, the respondent was charged with an offence under s. 16A(1)(c) of the Employees Provident Fund 1951. His Lordship Low Hop Bing J *inter alia* held that the provisions of s. 18(1) of the Employees Provident Fund Act 1951 must be read conjunctively with art.

145(3) of the Federal Constitution and s. 376 and the then s. 380 of the Criminal Procedure Code. His Lordship Low Hop Bing J distingushed the offence in that case as a non seizable offence under the procedure contained in the then s. 380(ii) of the Criminal Procedure Code whereas the offences in *Repco Holdings Berhad v. Pendakwa Raya* [1997] 4 CLJ 740 under the Securities Industries Act 1983 were seizable offences. His Lordship held that the conduct of prosecution by an officer from the Employees Provident Fund under s. 18(1) of the Employees Provident Fund Act 1951 did not contravene art. 145(3) of the Federal Constitution read with the then s. 380(ii)(b) of the Criminal Procedure Code until it was amended by Act A1015 with effect from 1 April 1998. For the sake of clarity, it is important to reproduce the provisions of s. 18(1) of the Employees Provident Fund Act 1951 and the then s. 380(ii)(b) of the Criminal Procedure Code.

Section 18(a) of the Employees Provident Fund Act 1951 reads as follows:

> Prosecutions in respect of any offence against the provisions of this Act or of any regulations or rules made thereunder may be conducted by any officer in writing in that behalf by the chairman of the Board.

Section 380 Prosecutions in summary non-seizable cases

> Notwithstanding anything in this Chapter contained
>
> (i) any public officer may prosecute in any Court in any case or class of cases in which he is by any written law authorised to prosecute in such Court;
>
> (ii) in summary non-seizable cases in the Court of a Magistrate –
>
> (a) the Public Prosecutor or a Deputy Public Prosecutor or a Police Officer may appear and conduct any prosecution;
>
> (b) *any Officer of any Government department or to any local authority or statutory authority or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the said department or authority specially to enforce;* (emphasis added)
>
> (c) any private person may appear in person or by advocate or, in the State of Terengganu, by a pleader and prosecute for an offence against his own person or property.

Be that as it may, even if there was a requirement of a sanction before the commencement of the proceedings in the instant appeal, s. 422 of the Criminal Procedure Code make it clear that the want of any sanction is only an irregularity unless such omission or want has occasioned a failure of justice (see *Joginder Singh v. Public Prosecutor* [1984] 2 MLJ 133 and *Madjai bin Sanusi v. Pengarah Imigresen Negeri Johor & 3 Ors* [1999] 7 CLJ 569).

In the circumstances, this court is of the view that there is no requirement for a sanction under the Food Act 1983 as contended by the learned counsel for the respondent. Therefore, the learned magistrate had erred in law when she relied on the decision in *Ak Koh Enterprise Sdn Bhd*'s case and upheld the preliminary objection which was raised on behalf of the respondent that a sanction was required under the Food Act 1983. Thus, the learned deputy public prosecutor's contention that the learned magistrate was wrong in law must succeed. (See *Public Prosecutor v. Pengurus MBf Building Services Sdn Bhd* [1998] 1 CLJ 678 at 683).

As to the second issue, whether the prosecution was caught by the 90 days rule as required under s. 19(2) of the Food Act 1983, this court is of the view that the learned magistrate had once again erred in law when she held that the expiration of the 90 days period was to be determined on the date when the respondent was charged in court on 26 June 2000 and not on the date when the complaint was filed in court by the Ministry of Health on 26 April 2000. Section 19(2) of the Food Act 1983 states:

> (2) Where any food has been purchased or procured from any person for analysis or examination, *no proceedings in respect of the sale thereof or of any offence against this Act shall be instituted after the expiration of ninety days from the time of purchasing or procuring that food.* (emphasis added)

In *Tang Shew Kai v. Reg* [1956] 22 MLJ 229, one of the issues that was raised was that the proceedings was not instituted within the statutory period of 28 days of the purchase of the drug as prescribed by sub-s. (4) of s. 20 of the Sale of Food and Drugs Ordinance (Cap 148). In that case, the purchase was made on 12 October 1954 and the Food and Drugs Inspector filed the complaint in the city police court on 5 November 1954 but the summons was not issued by the learned magistrate until 13 November 1954. In that case, it was contended on behalf of the appellant that the relevant date for determining when the proceedings was instituted was the date of issue of summons and that the laying of the complaint in court was not the date of the institution of the proceedings. However, His Lordship Whyatt CJ said that:

> It is necessary to have in mind at the outset that a summons is merely machinery to compel attendance in Court and that before any question of compelling a person's attendance can arise, a number of legal processes have to be completed in pursuance of the provisions of the Criminal Procedure Code. First, a complaint or allegation has to be made to a Magistrate that someone has committed an offence; secondly, the Magistrate has to take cognizance of the offence; thirdly, the Magistrate, subject to certain exceptions, has to examine on oath the person making the allegation; fourthly, if the Magistrate sees reason to doubt the truth of the complaint, he has to enquire into the case himself or

direct a police officer to do so; fifthly, and finally, when he is satisfied that there are grounds for proceeding, he issues a summons compelling the attendance of the accused.

The processes which have taken place up to that stage are clearly proceedings in relation to the particular offence which is being investigated, and it would, in my view, be as unreal as it would be inaccurate to say that such proceedings have not been instituted merely because the Magistrate does not until a later stage, issue a summons to compel the attendance of the accused. Furthermore if the issue of the summons were to be treated as the effective date for instituting proceedings, no prosecutor could be sure that they would be instituted within the statutory for instituting proceedings, no prosecutor could be sure that they would be instituted within the statutory period since after making his complaint, the prosecutor no longer has any control over the time which elapses before the summons is actually issued. That depends upon the speed with which the machinery of the Courts is functioning at that particular juncture; it may take a very short time or it may take several days as it did in the present instance. It is clearly not the intention of sub-section (4) of section 20 that the question whether proceedings were instituted in time should depend upon uncertain and incalculable factors outside the control of the prosecutor. In my judgment, proceedings were instituted in the present case when a complaint was made on the 5th November 1954 and therefore, since this date falls within the time limited by the Ordinance the Magistrate had jurisdiction to hear the case.

This court is of the view that the learned magistrate ought to have held that there was compliance of the 90 days statutory period when the complaint was filed and registered in court on 26 April 2000 by the Ministry of Health being the relevant date to determine when the proceedings were instituted and not on the date when the respondent was charged in court on 26 June 2000. Accordingly, she ought to have held that the proceedings were instituted in accordance with the requirement under s. 19(2) of the Food Act 1983 when the complaint was filed and registered in court on 26 April 2000.

It is noted with much regret that the learned counsel for the respondent did not appreciate or failed to distinguish the facts in *Perumal v. Public Prosecutor* [1970] 2 MLJ 265 and *Carlsberg Brewery Malaysia Bhd v. Pendakwa Raya* [1993] 1 MLJ 273 to the issue raised in the instant appeal.

In *Perumal v. Public Prosecutor* [1970] 2 MLJ 265, His Lordship Suffian FJ dealt with the following issues and said:

1.(a) Where an accused is charged for an offence under the Prevention of Corruption Act 1961 in addition or alternatively to a prescribed offence, is a **consent** required by section 26 of the said Act sufficient if it authorizes the prosecution of the accused only for an offence under the Act?

(b) If the answer is in the negative, what is the effect on a trial proceeding with such **consent** only?

2. Is the point of time for institution of a prosecution within the meaning of section 26 of the Act the moment at which the Court asks an accused person to plead to the charge and, if not, what is the point of time indicated?

3. If no adequate **consent** is available and no Deputy Public Prosecutor is present at the time when an accused person is required to plead to an offence under the Prevention of Corruption Act and/or a prescribed offence, would the presence of the Deputy Public Prosecutor as prosecutor **at the hearing of the said charges against the accused on a subsequent date be deemed to be sufficient consent for institution of prosecution within the meaning of section 26**? (emphasis added)

In *Perumal v. Public Prosecutor* [1970] 2 MLJ 265 one of the issue raised was that the consent of the public prosecutor which was filed on a date subsequent to the date when the accused was called upon to plead, does not validate the institution of the prosecution to bring it within the meaning of s. 26 of the Prevention of Corruption Act 1961. In that case, it was held that the prosecution under the said Act is instituted when the accused is called upon to plead to the charge. In the instant appeal, the issue was distinctively raised as to whether the proceedings were instituted before the expiration of 90 days from the time of purchasing the food under the Food Act 1983 when the complain was filed and registered in court or on the date when the respondent was charged in court on 26 April 2000.

In *Carlsberg Brewery Malaysia Bhd v. Pendakwa Raya* [1993] 1 MLJ 273, there was a preliminary objection raised by counsel for the appellant that the proceedings in the Magistrate's court were time barred by virtue of s. 19(2) of the Food Act 1983 as the accused was presented with an amended charge on 23 October 1992. The prosecuting officer submitted that the charge was filed in the Magistrate's Court on 19 August 1992. In construing s. 19(2) of the Food Act 1983, His Lordship Mahadev Shankar J (as he then was) said:

> Section 19(2) of the Act envisages two separate events, upon the occurrence of which time begins to run. The first event is the time when the food was purchased by the consumer. This time would be simultaneous with the time it was sold. In the present case, that time was 7.50pm on 20 May 1992. By s. 54 of the Interpretation Act 1948 and 1967, time would begin to run from 21 May 1992. The 90th day thereafter was 18 August 1992. On 19 August therefore, 90 days had expired from the time of purchase. Since the words of s. 19(2) of the Act are mandatory, no prosecution could be instituted after 18 August 1992 for the offence charged, which was the sale of the allegedly offending article.

> The second event envisaged by s. 19(2) is the 'procuring from any person for analysis or examination'. With respect, this event is meant to cover a situation where an authorized officer under the Act exercises his power under s. 5 of the Act, to demand from any vendor or manufacturer or his agent a sample for the purpose of analysis. If that is the route by which it is discovered subsequently that the article offends against s. 13 of the Act, prosecution must be instituted within 90 days of the procurement.

In *Carlsberg Brewery Malaysia Bhd v. Pendakwa Raya* [1993] 1 MLJ 273, it is clear that the charge was filed in the Magistrate's Court two days after the expiration of the 90 days which is envisaged by s. 19(2) of the Food Act 1983. The learned magistrate in that case held that time starts to run the next day from the time when the Health Inspector received the offending bottle of beer, ie, on 22 May 1992. He held that the proceedings were not time barred and was instituted within the 90 days statutory period. As pointed out by His Lordship Mahadev Shankar J (as he then was), there are two separate events under s. 19(2) of the Act, one is, the time when the food is purchased by the consumer or the time when it is sold, the second event is, where an authorised officer acts under s. 5 of the Act to demand from any vendor or manufacturer or agent a sample for the purposes of analysis.

Whereas in the instant appeal, the issue that was raised was, whether the relevant date for determining when the proceedings were instituted was the date when the information for the summons was filed and registered in court ie, 26 April 2000 or on the date when the respondent was charged in court ie, 26 June 2000. The learned magistrate held that the expiration of the 90 days period was to be determined on the date when the respondent was charged in court on 26 June 2000 and not the date when the complaint was filed and registered in court on 26 April 2000. This court is of the view that the learned magistrate ought to have held that the date when the complaint was lodged and registered in court on 26 April 2000 by the Ministry of Health was the relevant date for determining whether the proceedings were instituted in compliance with the requirement under s. 19(2) of the Food Act 1983 and not the date when the respondent was first charged in court on 26 June 2000. In *Public Prosecutor v. Lim Shui Wang & Ors* [1979] 1 MLJ 65, the Rt Hon Suffian LP said the word ""institute" means to set on foot, initiate, start …"

This court is of the view that the proceedings in the instant appeal were instituted against the respondent well before the expiration of the 90 days requirement as stipulated under s. 19(2) of the Food Act 1983. The learned magistrate had therefore erred in law when she held that the proceeding were not instituted before the expiration of 90 days from the time the food was purchased.

It cannot be denied that the Ministry of Health or the prosecuting officer has no control over the complaint filed in court for the issuance of the summons under the Food Act 1983 as once it is filed and registered in court it will then all depend on the particular court as to when the magistrate is able to act on the complaint and issue the summons. There may be instances where the magistrate may have gone on leave or is away attending a course or is on duty outstation or on circuit. In the circumstances, does it mean that the Ministry of Health is responsible for not having issued the summons if the summons was not issued by the court against the respondent to appear in court before the expiration of the 90 days statutory period. It is the view of this court that the statutory period of 90 days cannot be calculated according to the whims and fancies of a magistrate who acts upon step to issue the summons according to his or her convenience and that could not have been the intention of Parliament when it stipulated the 90 days requirement under the Food Act 1983 and that a purposive interpretation ought to be given to the requirement of the 90 days period.

In conclusion, this court is of the view that there was no requirement for a sanction under the Food Act 1983 and that the proceedings were rightly instituted against the respondent and within the statutory period of 90 days by the Ministry of Health when the complaint was filed and registered in court on 26 April 2000. Accordingly, the learned magistrate had the jurisdiction to hear the case and she should have overruled both the preliminary objections and proceeded with the case.

As to the order of the learned magistrate which acquitted and discharged the respondent, it is the view of this court that s. 173(c) and (f) of the Criminal Procedure Code does not empower the learned magistrate to order an acquittal without hearing the evidence of the prosecution (see *Public Prosecutor v. Mat Zain* [1948-49] MLJ Supp. 142, *Chu Chee Peng v. Public Prosecutor* [1973] 2 MLJ 35, *Public Prosecutor v. Zainuddin & Anor* [1986] 2 MLJ 100, *PP v. Ooi Lye Seng* [1991] 2 MLJ 332, *Public Prosecutor v. Mahmud* [1974] 1 MLJ 85, *Public Prosecutor v. Soon Tiew Choon* [1976] 1 MLJ 189, *Public Prosecutor v. Z* [1995] 4 CLJ 383).

Accordingly, the order of acquittal and discharge by the learned magistrate was not correct as even if she had concurred with the preliminary objections, she could have only discharged the respondent not amounting to acquittal and not grant a complete acquittal. In the circumstances, the appeal by the learned deputy public prosecutor is allowed, the order of acquittal by the learned magistrate is set aside and the case is remitted back to the Magistrate's Court, Kuala Kangsar to enable the court to record the respondent's plea. As the

learned magistrate who acquitted the respondent had not heard the evidence of the prosecution, the same magistrate could hear the case. The respondent is ordered to appear before the Magistrate's Court, Kuala Kangsar.